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Taking a Second Look at Arrestee DNA in California

NOVEMBER 11, 2013 BY [MARK WILSON](#) 1 COMMENT

Last term, the U.S. Supreme Court decided in *Maryland v. King* that Maryland could take suspects' DNA as a matter of course following an arrest, without any particular reason for doing so. After the *King* decision, appellants in the Ninth Circuit case *Haskell v. Harris* petitioned for (and were granted) a rehearing. *Haskell* called into question the constitutionality of California's own DNA testing law. In fact, Justice Kennedy cribbed from Judge Milan Smith's opinion in *Haskell* when concluding that there was no constitutional violation. So what is the fate of California's statute?

If Maryland's statute represents the outer boundaries of constitutional acceptability, California's law is woefully deficient. In Maryland, a suspect's DNA is tested after he is arrested for a violent crime (murder, rape, first-degree assault, kidnapping, arson, etc.) or burglary. The DNA sample is not processed and placed in the state database until the arrestee is arraigned on the charges. If a court does not hold the arrestee over on the charges, the DNA sample is automatically destroyed. The sample is also automatically destroyed if the charges do not result in a conviction, a conviction is subsequently reversed, or the defendant is granted an unconditional pardon.

California's statute tips the scales of DNA collection in favor of the state. In California, a suspect's DNA is taken and processed as soon as he is arrested on any felony charge. The felony determination — and thus the determination of whether there will be DNA taken — is made by the arresting officer at the time the suspect is arrested. At least in Maryland, as Justice Kennedy pointed out, a magistrate has decided there is probable cause for the charges.

And unlike Maryland's statute, in California the onus rests almost entirely with the suspect to have his DNA removed from the system; even then, the removal is characterized as a "request." If the suspect is found not guilty, the case has been dismissed or the judgment reversed, no charges were filed, or the suspect is "factually innocent," then the suspect must petition the trial court, in writing, to destroy the sample and remove it from the database. If charges were never filed, the suspect must wait until the statute of limitations for filing the charges expires. In any event, the court has the discretion to grant or deny the request and the Department of Justice can object to the request. Oh, and by the way, the judge's order is not appealable.

Justice Kennedy hung his hat on "identification" as the compelling state interest in *King* — as in, identifying the suspect when he gets to the police station (this is how he can characterize the DNA swab as an administrative activity incident to the booking process). But as Justice Scalia reminded us in his dissent, Maryland's law expressly prohibits testing the DNA until *after* the arraignment. So how did Mr. King get identified? Either his identification documents, his own admission, or his fingerprints.

Ah, fingerprints! Both Justice Kennedy and Judge Smith pointed out the ready analogy between DNA and fingerprints. But neither quite addressed the elephant in the room: if fingerprints are so good at identifying people when they get down to the police station (and they are), why do police need to take DNA? Both judges grappled with that question by concluding that a suspect's criminal past — both known and unknown — is part of his "identity," and police should be able to find that out by comparing the suspect's DNA to samples of unknown suspects' DNA.

If this sounds less and less like an administrative or special needs search and a lot more like investigation, you're right. And Justice Scalia is your champion. Dissenting in *King*, he wrote, "It is obvious that no such noninvestigative motive exists in this case. The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State's custody, taxes the credulity of the credulous."

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Thanks, however, to Justice Kennedy's framing the issue as a question of identification, the fact that DNA in California can be tested immediately cuts in favor of the state. Judge Smith observed that DNA is tested, on average, in 30 days, but also pointed out that it can be tested in as few as five. But even this doesn't make sense: arraignment must happen in California no more than 48 hours after the arrest, excluding Sundays and holidays. Hopefully, by then, the court will know who the suspect is — and all without involving DNA. So where does that leave even the tenuous "identification" argument? Ideally on the side of the road where it belongs, but thanks to an expansive definition of "identification" heartily endorsed by Justice Kennedy, the Ninth Circuit seems poised once again to conclude that California's DNA testing statute doesn't run afoul of the Constitution.

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